SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 235

IN THE MATTER

OF

HYGRADE ENVELOPE CORP., Bankrupt.

GIBRALTAR FACTORS CORPORATION,
Petitioner,

against

SAMUEL S. BARANOW, Trustee in Bankruptcy of HYGRADE ENVELOPE CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Gibraltar Factors Corporation (hereinafter "Gibraltar") prays that a writ of certiorari issue to review the orders of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on July 13, 1966 and April 1, 1968.

Opinions Below

The first opinion of the Court of Appeals is reported in 366 Fed. (2d) 584. It is reproduced in the Appendix hereto at page 55a. The opinions of the District Court and Referee in Bankruptcy are not officially reported. They are included in the Appendix at page 1a and page 32a, respectively.

The second opinion of the Court of Appeals has not as yet been reported. It is printed in the Appendix hereto at page 65a.

The second opinion of the District Court, by Judge Weinstein, is reported at 272 F. Supp. 451. It is reproduced herein at page 33a of the Appendix.

The second opinion of the Referee is included in the Appendix at page 16a.

Jurisdiction

The first order of the Court of Appeals was entered on July 13, 1966. A timely petition for rehearing was granted on September 28, 1966. (366 Fed. (2d) 584, 589-599.

After remand, further proceedings were had before the Referee, which ultimately reached the Court of Appeals again, resulting in an opinion by that Court and its order, both dated April 1, 1968. Petition for rehearing was denied on April 24, 1968.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether the value of a life insurance policy allegedly preferentially transferred in violation of Sec. 60 of the Bankruptcy Act is determined as of the time the transfer is made or as of a date subsequent thereto by what occurs after bankruptcy intervenes?

2. Whether with respect to the aforesaid life insurance policy, the value of the policy is measured by its cash surrender value at the time of transfer or by the face value thereof realized because of the unanticipated subsequent sudden death of the insured?

3. Whether a life insurance policy obtained by a corporate bankrupt in the State of New York on the life of its key executive originally payable to the corporation and thereafter assigned to a creditor is exempt property under Sec. 166 of New York State Insurance Law and Section 6 of the Bankruptcy Act.

4. Whether a transfer of an insurance policy on the life of a key executive of a corporation to a creditor to induce the creditor to continue its financing of the corporation is a transfer for a present consideration within the meaning of Section 60-b of the Bankruptcy Act?

5. Whether the Court of Appeals can properly reject a finding by a Referee in Bankruptcy, affirmed by the District Court, that the creditor did not have reasonable cause to believe the bankrupt was insolvent at the time of the transfer of a life insurance policy to it, where the Court of Appeals did not and could not hold that the finding was "clearly erroneous", but instead adopted a new concept that the scope of appellate review

"is not limited to rules that are 'clearly erroneous'. It is enough that the Appellate Court should be convinced, as we are here, that the result does not jibe with the applicable rule of law."

Statutes Involved

BANKRUPTCY ACT

Section Sixty (11 U. S. C. §96)

§60. Preferred Creditors. a. (1) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

b. Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: *Provided, however,* That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate,

in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

SECTION SIX (11 U. S. C. §24)

§6. Exemptions of Bankrupts. This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State: *Provided, however,* That no such allowance shall be made out of the property which a bankrupt transferred or concealed and which is recovered or the transfer of which is avoided under this Act for the benefit of the estate, except that, where the voided transfer was made by way of security only and the property recovered in excess of the amount secured thereby, such allowance may be made out of such excess.

SEC. 166 (1) NEW YORK STATE INSURANCE LAW

§166. Exemption of proceeds and avails of certain insurance and annuity contracts.

1. If any policy of insurance has been or shall be effected by any person on his own life in favor of a third person beneficiary, or made payable, by assignment, change of beneficiary or otherwise, to a third person, such third person beneficiary, assignee or payee shall be entitled to the proceeds and avails of such policy as against the creditors, personal representatives, trustees in bankruptcy and receivers in state and federal courts of the person effecting

the insurance. If any policy of insurance has been or shall be effected by any person upon the life of another person in favor of the person effecting the same or made payable, by assignment, change of beneficiary or otherwise, to such person, the latter shall be entitled to the proceeds and avails of such policy as against the creditors, personal representatives, trustees in bankruptcy and receivers in state and federal courts of the person insured; if the person effecting such insurance shall be the wife of the insured, she shall be entitled to the proceeds and avails of such policy as against her own creditors, trustees in bankruptcy and receivers in state and federal courts. *If any policy of insurance has been or shall be effected by any person on the life of another person in favor of a third person beneficiary, or made payable, by assignment, change of beneficiary or otherwise, to a third person, such third person beneficiary, assignee or payee shall be entitled to the proceeds and avails of such policy as against the creditors, personal representatives, trustees in bankruptcy and receivers in state and federal courts of the person insured and of the person effecting the insurance.* . . . The person insured in a case under the first sentence of this subsection or the person effecting the insurance other than the wife of the insured in a case under the second sentence, and the person effecting the insurance under the third sentence therof, or the executor or administrator of any such persons, or a person entitled to the proceeds or avails of such policy in trust for such persons shall not be deemed a third person beneficiary, assignee or payee, . . . (Emphasis supplied.)

Statement and Necessary Facts

Hygrade Envelope Corp. was adjudicated a bankrupt in the District Court for the Eastern District of New York on a voluntary petition filed on January 24, 1963. On No-

vember 26, 1962, it had transferred to Gibraltar Factors Corp. a term insurance policy in the face amount of $100,000 on the life of its vice president and general manager, Jack Wohl. A referee in bankruptcy and the district court initially rejected a counterclaim by the trustee under §60b to recover as a preference the proceeds of the policy, $101,000, collected by Gibraltar as a result of Wohl's sudden death on December 5, 1962, on the ground that Gibraltar did not have "reasonable cause to believe" Hygrade was insolvent on November 26. On a previous appeal the Court of Appeals disagreed and remanded the cause "so that the referee may make further findings and conclusions on the issues, reserved by him, whether the transfer was for or on account of an antecedent debt, §60a(1), and whether, if the transfer was preferential Gibraltar is entitled to a set off under §60c," as well as the claim, first advanced on Gibraltar's petition for rehearing in that court, "that the trustee is not entitled to recover because the insurance policy was exempt property under New York Insurance Law §166(1) . . . " 366 F. 2d 584, 589-90 (2 Cir. 1966).

The case returned to the Court of Appeals with reaffirmance of the dismissal of the trustee's counterclaim by the same referee and a different district judge but with sharp disagreement between them as to the reason. The referee sustained the argument that the proceeds of the policy were within the exemption conferred by §6 of the Bankruptcy Act; he thought, however, that apart from this "the trustee has proved all of the elements required for a preference to be voided under the provision of Section 60 of the Bankruptcy Act and that consequently the trustee would be entitled to judgment on his counterclaim," free of any set-off by Gibraltar for advances subsequent to November 26, 1962. The district judge concluded that the policy was not exempt but held that the transfer was not "for or on account of an antecedent debt," and that in any event the

transfer was only in the amount of $393, the sum Hygrade would have realized on surrender of the policy, or at most $1,000, the cost of a new one-year policy, and should be disregarded as *de minimis*. The Court of Appeals modified by sustaining the trustee's right to obtain the face amount of the insurance policy but to be reduced by the amount advanced by Gibraltar at and subsequent to the assignment of the policy. Of course, if Gibraltar is successful on this appeal, the amount of Gibraltar's set off will become moot.

Gibraltar is in the business of financing, extending loans on a security basis, usually by chattel mortgages, merchandise liens and accounts receivable.

Commencing with 1955 and up to January 24, 1963 when Hygrade Envelope Corp. ("Hygrade") was petitioned into bankruptcy, Gibraltar was advancing sums of money to Hygrade on a security basis—chattel mortgages, merchandise liens and accounts receivable—pursuant to the terms of a financing agreement (83a, 96a).*

From the very inception, Gibraltar recognized that Wohl, vice-president and general manager of Hygrade was the "key man" of that company and, as is customary in such situations, conditioned the business relationship between the parties on the procurement of insurance on the life of Wohl (61a, 68a, 83a).

Gibraltar from the inception of the Hygrade financing relationship had received policies of insurance on the life of Wohl, first, in the face amount of $50,000; and then on July 22, 1960, $50,000.00 (61a, 83a) but one of the policies was a reducing policy and by November 26, 1962, the total insurance was $72,000 (61a, 84a).

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* The numbers in parentheses refer to the Joint Appendix filed in the Court of Appeals.

During the seven year period of business relationships, there were no discrepancies in any of the transactions between the parties. But just two days before November 26, 1962, Gibraltar discovered, as the result of a "spot check" of the accounts, that one of Hygrade's regular customers, Avrec, had been invoiced although shipment had not been made (66a and 67a). Thereupon Gibraltar made inquiry of Wohl, who admitted that shipment had not been made on this invoice but explained that this was actually a prebilling of an order relating to inventory on hand (68a), which order he anticipated would be filled within a short time (67a) and that he had the merchandise to cover the buyer's order (68a). This was the first of such incidents in the seven year period of business relationship between the parties (66a, 76a).

Gibraltar's representative, Herbert Hurwitz, informed Wohl that he was required to report this incident to his superior, Mr. Schulder, and Wohl requested that the relationship between the parties should not be terminated. Hurwitz conferred with Mr. Schulder. The entire file was reviewed by him. He noted that the advances to Hygrade had been steadily increasing from the original aggregate of $100,000 to $400,000 and that the insurance on Wohl, although originally in the face amount of $100,000, had been reduced to $72,000. He agreed to continue the financing arrangement between the parties but only on the condition that there be additional insurance furnished in the amount of $100,000 on the life of Wohl, at the expense of Hygrade (60, 61, 62a).

Hurwitz then notified Wohl of Mr. Schulder's conditions for a continuation of the financing relationship. Wohl agreed and it was ascertained that the premium for the additional insurance was $1,000 (70a). Wohl wanted to save or retain this $1,000 and instead of effecting new insurance offered to have Hygrade assign an existing $100,000 policy which Hygrade had on his (Wohl's) life having a

surrender value of $393 (70a). Gibraltar accepted the assignment thereby enabling Hygrade to avoid the expenditure of in excess of $600.

Wohl had Teigman, Hygrade's president, execute and deliver the assignment of said policy to Gibraltar on November 26, 1962, and simultaneously therewith Gibraltar loaned Hygrade $12,500 (71a); on the following day, the sum of $6,200; on the next day, the sum of $2,600; on the next day, the sum of $2,000; on the next day, the sum of $4,000 and subsequent advances, all of which aggregated, $60,970.00 (97a). At this point, it should be noted that Gibraltar could have credited Hygrade's account for this $393 [no usury statute being involved], and there would have been no basis for this litigation. The absence of this bookkeeping entry to reflect the transaction should not distort an otherwise perfectly normal legitimate business transaction.

The cash surrender value of this policy on the date of this assignment, November 26, 1962, was $393.00. Wohl passed away unexpectedly on December 5, 1962 (40a). The bankruptcy proceeding was initiated on January 24, 1963. Gibraltar collected on this policy the sum of $101,000.00 and after liquidating all of the collateral and crediting the account with this $101,000.00, there remained a deficit of at least $50,000 (72a).

The foregoing statement of facts assumed that Gibraltar had reasonable cause to believe that the bankrupt was insolvent when it assigned the policy in accordance with the holding of the Court of Appeals on the first appeal. It should be noted that when the case was first tried before the Referee, he held that Gibraltar "did not have reasonable cause to believe". This finding was affirmed by the District Court, per Judge Bruchhausen, but was reversed by the Court of Appeals. The Referee's original decision

also held that the insolvency of the bankrupt on November 26, 1962, the date of the transfer of the policy, had been established only by a "slim showing" (89a). If the policy had been valued at $100,000 on the date of the transfer, as the Court of Appeals did in its second decision, there could have been no finding of insolvency on the date of the transfer, thereby defeating the trustee's claim.

Thus a double standard of valuation was used in this case: (a) For the purpose of establishing insolvency, the value of the policy was $393, its cash surrender value, but (b) for the purpose of recovery, the valuation is $100,000.

Reasons for Granting the Writ

1. The Court of Appeals held that the value of the policy allegedly preferentially transferred is determined, not as of the date of the transfer but as of a date subsequent thereto, and after the intervention of bankruptcy. The decision of the Court of Appeals is squarely in conflict with the decision of this Court in *Continental Commercial Trust & Savings Bank* v. *Chicago Title & Trust Co.*, 229 U. S. 435, and the decision of the Court of Appeals (4th Cir.) in *Virginia National Bank* v. *Woodson*, 329 Fed (2d) 836, where the court made the following pertinent statement:

> "* * * *The test is not what the creditor receives but what the bankrupt's estate has lost.* It is the diminution of the bankrupt's estate, not the unequal payment to creditors, which is the evil sought to be remedied by the avoidance of a preferential transfer. As was pointed out by the Supreme Court in Continental & Commercial Trust & Savings Bank v. Chicago Trust & Savings Co., 229 U. S. 435 (1913). 'The fact that what was done worked to the benefit of

> the creditor, and in a sense gave him a preference is not enough, unless the estate of the bankrupt was thereby diminished' ''. (Italics ours.)

Value is determined as of the time of the transfer and not by events subsequent thereto. 3 Collier's p. 849, states:

> "Value determined as of time of transaction. The 'character of the transactions is to be judged at the time when they were made, not by how the collateral panned out afterwards.' Matter of Freeman Cotting Coat Co. (D. C. Mass.), 212 Fed. 548, citing Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co., 229 U. S. 435, 33 S. Ct. 829, 57 L. Ed. 1268."

In *Trionics Sales Corp.* v. *Nautec Corp.*, 21 N. Y. (2d) 574, 580, decided April 10, 1968 (Official Advance sheets May 29, 1968), the New York Court of Appeals stated:

> "However, the validity of the transfer must be determined at the time of transfer"

and not by what happened several weeks later.

Judge Weinstein in the District Court held in accordance with the foregoing authorities (136a-139a). But reversing that the Court of Appeals rejected this sound and logical concept, stating—"This concentration on the situation as of November 26 gives insufficient weight to the final portion of the definition of a preferential transfer in Sec. 60a(1), to wit, 'the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.' " and cited *Palmer Clay Co.* v. *Brown*, 297 U. S. 227, 229 as its authority.

That case has nothing to do with the problem in this case because it does not relate to the problem of valuation of the property at the time of the preferential transfer. It certainly does not hold that the amount of the depletion of the estate is determined as of a date subsequent to the date of transfer. What it does hold is that a payment received as the result of a preferential transfer may be recovered because the amount of such payment to the transferee depleted the estate. The question of valuation was not involved because in that case it was cash that was transferred. However, the clear implication of the case is that the transferee is only accountable for the value of the property as of the date of the transfer. In other words, *Palmer* v. *Brown* reaffirms the principle that the transfer should not enable a creditor to obtain a greater percentage than other creditors but did not treat with nor decide the question of value of the property at the time of the transfer because there was no necessity for such determination since the property was cash.

On further reflection it will be seen that not only is the decision of the Court below contrary to the existing case law, but that it defeats the very purpose of the Preference Statute (Sec. 60, Bankruptcy Act).

If the criterion is to be what the creditor ultimately received instead of what the estate lost, circumstances may occur which substantially diminish the value which the property had at the time of transfer. In that event, although the estate would have lost much at the time of transfer, it could not recover much if the rule announced by the lower Court were applied. The Court would be compelled to hold that since the transferee ultimately received little or nothing, likewise should the estate receive little or nothing. Stated another way, although the transferee would have received a substantially greater percentage of his debt than other creditors would have received at the moment of transfer, the transferee would be obliged to

return only the lower or nonexistent value which was realized on subsequent liquidation.

Thus, if the theory enunciated by the Court below were to be followed in the case at bar, if Gibraltar did not elect to surrender the policy for the cash surrender value and the insured (Wohl) had survived the surrender date, the trustee would be precluded from recovering the cash surrender value at the time of the transfer. Although in this case the cash surrender value is small, the rule would have to be applied in cases where the cash surrender value is substantial. The estate would be the loser. This rule would apply to other property also, as for instance, stock in a listed corporation where the corporation subsequently fails, machinery that is made obsolete by a new invention, and so on.

Contrary to the holding below, the correct rule is, and should be continued "the test is not what the creditor receives but what the bankrupt's estate has lost", or as Judge Weinstein in the District Court put it:

> "What the bankrupt lost at the moment of assignment was only what it would have then had available for distribution had it not made the transfer."

2. The Court of Appeals held that the trustee should recover because "the trustee's position accords with the equities as we view them" and further stated "The case is the unusual one where 'market value' affords no real indication of an assets worth." In so deciding, the Court of Appeals disregarded the following authorities which limit the recovery to the cash surrender value and certainly not to a vague self styled standard of what is believed is "equitable."

Meyer v. *U. S.*, 375 U. S. 233;
U. S. v. *Bess*, 357 U. S. 51;

Holden v. *Stratton*, 198 U. S. 202;
Burlingham v. *Crouse*, 228 U. S. 459;
Everett v. *Judson*, 228 U. S. 474;
Andrews v. *Partridge*, 228 U. S. 479;
Hogan v. *Hall*, 118 Fed. (2d) 247 (5 Cir. 1941);
Levine v. *Gray*, 271 A. D. 891, 67 N. Y. S. (2) 87 aff'd 296 N. Y. 1018;
Hechtkopf v. *Mendlowitz*, 156 Misc. 635;
N. Y. Insurance Law, Sec. 166.

Thus the Court of Appeals has decided an important question of Federal Law in a manner inconsistent with the applicable decisions of this Court, Courts of Appeal of other circuits and the N. Y. State Courts cited above. If the foregoing authorities are disregarded, then we are left with an important question of Federal Law which has not been but should be settled by this Court. This is so because life insurance policies are greatly in use in the financial world as collateral security for loans by banks, financial institutions and others who are entitled to an authoritative ruling by this Court as to what the law is when bankruptcy intervenes. And surely there is nothing equitable about applying a double standard to the valuation of the policy.

Although the Referee had determined on the first hearing that insolvency was shown by a slim margin at a time when the policy only had a cash surrender value of $393 and was not even carried on the books of the bankrupt as an asset, the Court of Appeals for the purpose of recovery by the trustee magnified it to the sum of $100,000, flatly refusing to follow the aforecited decisions limiting the recovery to cash surrender value. It also overruled Judge Weinstein's considered opinion on this point:

> "What the bankrupt lost at the moment of assignment was only what it would have them had available for distribution had it not made the transfer. There is no evidence in the record that Wohl was not in average health (Teigman, March 22,

1965, p. 38) or that Gibraltar was determined to secure Wohl's death or drive him to take his own life. The value at the time of assignment was either $393 or $1,000. The lower figure was the cash surrender value or what the policy could be sold for. The higher figure was the cost of a new policy." (51a of this Appendix.)

3. In refusing to hold that life insurance is exempt property, the Court of Appeals refused to follow the decisions of this Court, other circuit Courts of Appeal and New York State Courts. The cases we have cited in Paragraph "2" as a reason for the granting of the writ also hold that life insurance is exempt property if they are exempt by the laws of the State where the transaction arose, in this case, New York. *Meyer* v. *U. S.*, 375 U. S. 233 dealt with New York, also and with Section 166 of the New York Insurance Law. So did several of the other cases. The Court of Appeals held that under Section 6 of the Bankruptcy Act, allowance of exemptions to bankrupts, would not include an assignee who was not a member of the bankrupt's immediate family, stating:

> "Section 6 of the Bankruptcy Act is limited to allowances 'to bankrupts' and while we have expanded this to include members of the bankrupt's immediate family who have been named as beneficiaries, see *In re Messinger*, 29 F. 2d 158 (2 Cir. 1928), cert. denied, 279 U. S. 655 (1929); *Schwartz* v. *Holman*, 68 F. 2d 814 (2 Cir.), cert. denied, 293 U. S. 565 (1934); *In re Keil*, 88 F. 2d 7 (2 Cir. 1937); *Schwartz* v. *Seldon*, 153 F. 2d 334 (2 Cir. 1945), we know of no principle and have not been informed of any precedent that would justify expanding the exemption Congress allowed 'to bankrupts' so as to include a policy of life insurance, not exempted by state law for the bankrupt, when this is in the hands of an unrelated person."

We submit this is squarely in conflict with the decisions we cited in Paragraph 2 as a reason for granting the writ. In any event if the Court of Appeals is correct in stating that it knows of no principle or precedent, then it is time for this Court to settle the law in this respect. The Court of Appeals admitted in its opinion that Section 166 (1) of the New York Insurance Law seems to support Gibraltar's contention, but stated it could not override Sec. 6 of the Bankruptcy Act.

We submit that the Court of Appeals was further in error in refusing to follow the exemption statutes and decision of this Court in *Crooks* v. *Harrelson,* 282 U. S. 55, 60, where this Court stated:

> "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. *Monson* v. *Chester,* 22 Pick. 385, 387. It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts. See *In re Alma Spinning Company,* L. R. 16 Ch. Div. 681, 686; *King* v. *Commissioners,* 5 A. & E. 804, 816; *Abley* v. *Dale,* L. J. (1851) N. S. Pt. 2, Vol. 20, 233, 235. And see generally *Chung Fook* v. *White,* 264

U. S. 443, 445; *Commr. of Immigration* v. *Gottlieb*, 265 U. S. 310, 313."

Also, *Armstrong Paint* v. *NuEnamel Corp.*, 305 U. S. 315, 333.

Judge Weinstein also held, although admitting he did not feel too confident about it (129a), that Section 166(1) of the New York Insurance Law, which uses the word "persons" to include "corporations" did not include a corporation. This reading of the statute ignores New York General Construction Law, Sec. 37, which defines a "person" to include a "corporation" and the New York cases cited in Paragraph "2" hereof, and, of course, is contrary to the current business facts of life, where innumerable banking corporations and financing institutions take assignments of policies to secure loans.

4. In a well considered opinion Judge Weinstein in the District Court held that there was a present consideration for the assignment of the policy when Gibraltar agreed to continue the financing of the bankrupt in consideration of the assignment and therefore the assignment was not preferential (136a). The Court of Appeals held that it was both a past and present consideration. This important question appears never to have been decided by this Court. The law of Preferences is, of course, a highly important area of the Bankrupt Law, which should be definitively settled by this Court.

5. On the first trial the Referee in Bankruptcy had held that Gibraltar did not have reasonable cause to believe the bankrupt was insolvent when it took an assignment of the Policy. The Court of Appeals reversed the Referee's finding, affirmed by the District Court, not because it was clearly erroneous but because it held "the result does not jibe with the applicable rule of law." This is a radical departure from the accepted usual course of the scope of judicial view of factual findings of the lower

court by the Court of Appeals and in conflict with F. R. C. P. 52 of this Court, numerous decisions of the other circuit courts of appeal and even prior decisions of the Court of Appeals as to call for the invocation of this Court's power of supervision.

We omit the citation of the plethora of decisions on this matter not only for the reason that surely every court is familiar with the rule, but because even the Court below in this very case states "There are indeed a multitude of opinions proclaiming, in one way or another, the applicability of the 'unless clearly erroneous' rule, see F. R. C. P. 52(a), to decisions of a referee or district judge that a creditor did or didn't have reasonable cause to believe his debtor was insolvent.".

Conclusion

The petition for a writ of certiorari should be granted because the Court of Appeals has decided federal questions in a manner which conflicts with applicable decisions of this Court, and decisions of the Court of Appeals of other circuits, has decided important questions of federal law which have not been but should be settled by this Court, has even departed from the accepted and usual course of the scope of judicial review so as to call for this Court's power of supervision; and has even flatly refused to follow state law insofar as it has decided state questions of law, which it necessarily did, with respect to New York Insurance Law, Sec. 166.

June 21, 1968

Respectfully submitted,

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